UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, vs. ANIL MATHUR, Defendant.	Case No. 2:11-cr-00312-MMD-PAL **REPORT OF FINDINGS AND RECOMMENDATION** (Motion to Dismiss - Dkt. #48)

Before the court is Defendant Anil Mathur's Motion to Dismiss based upon Overbreadth and Vagueness and Other Constitutional Principles (Dkt. #48). The motion was referred to the undersigned for a report of findings and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. The court has considered the Motion, the government's Opposition (Dkt. #60), and Mathur's Reply (Dkt. #70).

BACKGROUND

The grand jury returned an Indictment (Dkt. #1) against Mathur on August 23, 2011, charging him with nine counts of paying illegal remunerations, in violation of 42 U.S.C. § 1320 a-7b(b)(2)(A) (the "Anti-Kickback Act"). The Indictment alleges Mathur offered kickbacks and bribes to a physician in exchange for referrals of Medicare patients and contains forfeiture allegations. The first forfeiture allegation seeks to recover $6,000.00 in kickbacks or bribes allegedly paid by Mathur between July 30, 2010, and December 7, 2010. The second forfeiture allegation seeks a monetary judgment in the amount of $14,347.68–the amount the government contends Medicare paid for services rendered after March 23, 2010, to Medicare patients referred by the physician receiving kickbacks or bribes.

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DISCUSSION

Pursuant to Federal Rule of Criminal Procedure 12(b), "Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion." In determining a motion to dismiss an indictment, "a court is limited to the face of the indictment and must accept the facts alleged in that indictment as true." *United States v. Ruiz-Castro*, 125 F. Supp. 2d 411, 413 (D. Haw. 2000) (citing *Winslow v. United States*, 216 F.2d 912, 913 (9th Cir. 1954), *cert. denied*, 349 U.S. 922 (1955)). The indictment itself should be "(1) read as a whole; (2) read to include facts which are necessarily implied; and (3) construed according to common sense." *United States v. Blinder*, 10 F.3d 1468, 1471 (9th Cir. 1993) (citing *United States v. Buckley*, 689 F.2d 893, 899 (9th Cir. 1982), *cert. denied*, 460 U.S. 1086 (1983)). The court's inquiry must end there. Arguments directed at the merits of the claims must be left for trial.

I. The Parties' Positions

A. Mathur's Motion (Dkt. #51)

Mathur's Motion to Dismiss challenges the constitutionality of the indictment on First and Fifth Amendment grounds. First, he argues that his relationship with the physician to whom the government alleges illegal remunerations were paid "implicates significant commercial speech issues." The government alleges that Mathur provided cash payments to the physician in exchange for patient referrals. Mathur claims that the objective evidence in this case demonstrates that he did not request that the physician send him patients. Rather, Mathur claims that he only sought favorable recommendations from a well-connected physician who could speak positively about Mathur to other professionals and recommend the services of Mathur's business, United Medical Supplies ("UMS").

Mathur contends that all of his statements to the physician involve promoting UMS for the purpose of acquiring more business based on the physician's favorable recommendations. Mathur's statements are merely solicitation of business which is commercial speech, protected by the First Amendment. He reasons that allowing the government to prosecute him for soliciting business would punish him for exercising his First Amendment rights and chill significant amounts of commercial speech. Mathur maintains that any remuneration he is alleged to have given the physician was not for the purpose of inducing patient referrals, but for the physician to promote and recommend the services

of UMS to others. Mathur argues the government is attempting to criminalize a business relationship in which a sophisticated physician would make favorable recommendations to other professionals about UMS' available respiratory services and supplies that the government acknowledges were legitimately provided to patients. Thus, the Indictment must be dismissed because the government is attempting to criminalize conduct and commercial speech protected by the First Amendment. If the court is unwilling to dismiss the Indictment, Mathur contends the court must convene an evidentiary hearing and require the government to present objective evidence demonstrating that the speech and expressions it seeks to criminalize are not protected by the First Amendment.

Second, Mathur argues that the Anti-Kickback Act is unconstitutionally applied to his conduct and is facially overbroad. He maintains his only motivation was to induce the physician to speak favorably about UMS to others. He claims the government's theory of this case is "ill-conceived, devoid of factual support and requires criminalization of [c]onstitutionally protected activity." The objective evidence in this case undermines the government's theory that Mathur paid remunerations to the physician with the specific intent to induce the physician to send Mathur patients covered by a federal heath care program. Mathur claims it was factually impossible to induce the physician to make referrals because the physician was acting in an undercover capacity. It was also legally impossible to induce the physician to make referrals because the physician certified under penalty of perjury to the medical necessity of any referrals made. Mathur claims that asking another person to promote one's business to others and offering remuneration for doing so cannot be a crime under the Anti-Kickback Act; otherwise, "the FBI would be storming the marketing department of every pharmaceutical and orthopaedic supply company." Mathur argues that the Anti-Kickback Act is unconstitutional as applied to Mathur's activities, expression, and speech.

Next, Mathur argues the Anti-Kickback Act is facially overbroad. He acknowledges the government has a legitimate interest in deterring and preventing health care fraud, especially involving Medicare and Medicaid. However, he maintains that when Congress enacted the Patient Protection and Affordable Care Act ("PPACA") in 2010, eliminating the Anti-Kickback Act's prior specific intent *mens rea* requirement, it "provided federal prosecutors exclusive discretion to criminalize otherwise [c]onstitutionally protected activity." Mathur claims that it is virtually impossible to know what the

Anti-Kickback Act covers and that the statute, as amended by the PPACA, is "of alarming breadth and allows the government to cast an exceptionally wide net in a substantial number of its applications." The breadth of the PPACA amendments to the Anti-Kickback Act, which eliminated the specific intent requirement, invites arbitrary and selective enforcement. The court should find that the Anti-Kickback Act is unconstitutional because it is overly broad in a substantial number of its applications.

Mathur also argues that the statute is unconstitutionally vague because it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute. He claims the Anti-Kickback Act is vague on its face and incomprehensible to a person of ordinary intelligence.

Finally, Mathur argues the Indictment should be dismissed because government counsel has not identified whether Mathur is being prosecuted under pre-PPACA version of the Anti-Kickback Act or the post-PPACA version. He claims his due process rights are violated because the Indictment is silent on this point, and government counsel has not provided a helpful response to defense counsel's inquiries. Mathur points out that paragraph four of the Indictment defines remuneration as "anything of value" and suggests the government can convict "if any one purpose of conferring remuneration is to induce that person to refer an individual for the furnishing of an item or service for which payment may be made under a Federal health care program, such as Medicare." The "one purpose" language is not contained in the Anti-Kickback Act. Although both the Third and Ninth Circuits have held that it is a violation of the Anti-Kickback Act if any one purpose of remuneration is to induce or reward referrals of federal health care program business, Mathur claims that the Supreme Court's decision in *United States v. Gaudin*, 515 U.S. 506 (1995), effectively overruled the "one purpose" rule.

He contends the court should conduct an evidentiary hearing to allow him to examine government witnesses about whether the physician and Mathur were engaged in commercially-protected activities. Mathur argues this is a legal question that should be resolved pre-trial, and one that "will have significant and far-reaching consequences for the health care industry (including the hospitality industry which depends upon executives and physicians frequenting their establishments and spending money)."

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B. The Government's Consolidated Response (Dkt. #60)

The government filed a consolidated Response to this Motion and Mathur's other Motion to Dismiss the Indictment (Dkt. #51). The Response argues that Mathur's extensive factual arguments about what the evidence in this case shows and the inferences that may be drawn from it are not appropriately considered by the court in a motion to dismiss. In deciding a motion to dismiss the Indictment, the court is limited to the facts alleged in the Indictment, which must be accepted as true. Here, the Indictment alleges that Mathur paid bribes to a physician in exchange for patient referrals in violation of the Anti-Kickback Act, and the jury must determine whether Mathur's conduct and payments to the physician were bribes or a lawful business practice. The Indictment alleges that Mathur made cash payments to the physician as a quid pro quo for patient referrals, which, according to the government, is precisely the conduct criminalized by the Anti-Kickback Act.

With respect to Mathur's First Amendment challenge to the Indictment, the government contends the Anti-Kickback Act prohibits remunerations, not speech. Courts have uniformly rejected the notion that bribery is protected speech. Mathur's Motion cites no case supporting his proposition the Anti-Kickback Act has been successfully challenged on First Amendment grounds. In *Gibony v. Empire Storage & Ice Co.,* the Supreme Court held that the First Amendment does not immunize "speech or writing used as an integral part of conduct in violation of a valid criminal statute." 336 U.S. 490, 498 (1949). Although political speech enjoys considerably greater First Amendment protection, bribery is not protected political speech. The government relies on a line of cases holding that bribes and threats are not protected merely because they are spoken or written.

The government acknowledges that solicitation of lawful business is a recognized form of commercial speech protected by the First Amendment. The Indictment alleges Mathur made payments ranging from $1,500 to $5,400 in exchange for patient referrals. The Anti-Kickback Act criminalizes corrupt payments in exchange for referrals, not statements related to those payments. The government argues that Mathur's fact-based arguments that he was not actually offering or giving illegal remuneration provides no basis to dismiss the Indictment. Rather, if his theory is accepted by the jury, Mathur has committed no crime, and the constitutional issue he raises will be moot.

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The government also argues that the Anti-Kickback Act is not unconstitutionally vague. Multiple courts of appeal, including the Ninth Circuit, and district courts have rejected Mathur's arguments that the Anti-Kickback Act does not provide fair notice that certain conduct is prohibited. In *Hanlester Network v. Shalala*, 51 F.3d 1390 (9th Cir. 1995), the Ninth Circuit applied controlling Supreme Court precedent and held that the Anti-Kickback Act gave fair warning of what is prohibited and was not constitutionally vague. The First and Eleventh Circuits have also held that the Anti-Kickback Act is not unconstitutionally vague as have district court decisions in the Northern District of Ohio and Middle District of Florida.

The government also acknowledges that the Anti-Kickback Act is a broad statute that captures a wide array of illegal activity. However, the government maintains that a number of federal statutes encompass a wide array of conduct and confer significant discretion upon prosecutors. Specifically, the mail or wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, the conspiracy statute, 18 U.S.C. § 371, and the RICO statute, 18 U.S.C. §§ 1961-1968, are all broadly-written statutes. Congress further limited the scope of the Anti-Kickback Act with a series of statutory and regulatory exceptions known as "safe harbors" which immunize certain practices from criminal prosecution. Thus, the government maintains Mathur had ample notice of the scope of the Anti-Kickback Act.

The government next addresses the Anti-Kickback Act's *scienter* requirement before and after the enactment of the PPACA. In 2010, before the enactment of the PPACA, there was a split of authority among the courts of appeal on the Anti-Kickback Act's *scienter* requirement involving the proper construction of the phrase "knowingly and willfully" in the statute. The government argues that Congress added subsection (h) to the Anti-Kickback Act to resolve that split and clarify the proper construction of the phrase "knowingly and willfully." The government maintains the majority position was first announced in the First Circuit's decision in *United States v. Baystate Ambulance & Hospital Rental Service, Inc.*, 874 F.2d 20, 33 (1st Cir. 1989). The First Circuit held that the phrase "knowingly" simply meant to do something voluntarily, not deliberately or by mistake or accident. The decision defined "willfully," for purposes of the Anti-Kickback Act, to mean doing something purposely, with the intent to violate the law, or doing something purposefully that the law forbids. The Fifth, Eighth,

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Tenth and Eleventh Circuits have also concluded that the government is not required to prove a defendant had knowledge of, and intended to violate, the Anti-Kickback Act.

The Ninth Circuit, however, construed the phrase "knowingly and willfully" to require the government to prove that a defendant: (a) knew the Anti-Kickback Act prohibited offering or paying remuneration to induce referrals; and (b) engaged in prohibited conduct with the specific intent to disobey the law. *Hanlester*, 51 F.3d at 1400. According to the government, the Ninth Circuit was the only court to conclude that the phrase "knowingly and willfully" in the Anti-Kickback Act required proof of a violation of a known legal duty.

With the PPACA's addition of subsection (h) to the Anti-Kickback Act in 2010, Congress resolved the circuit split on the *scienter* requirement by clarifying that a defendant need not have knowledge of or specific intent to violate the Anti-Kickback Act. Subsection (h) did not remove the *scienter* requirement altogether. Rather, the government maintains Congress implicitly adopted the majority statutory construction of "knowingly and willfully" first articulated by the First Circuit in *Baystate Ambulance*. The government asserts that the legislative history of the PPACA and its predecessor bills establish Congress' intent that the PPACA resolves the split of authority among the circuits and clarifies that the government need not show a defendant's actual knowledge of the Anti-Kickback Act or a specific intent to violate it in order to prove a violation of the statute.

C. Mathur's Reply (Dkt. #70)

The Reply reiterates arguments that the Anti-Kickback Act has no apparent boundaries and gives prosecutors virtually unfettered discretion to prosecute a myriad of activities. Mathur again claims that his prosecution is highly unusual and that the local United States Attorney's Office appears to have deviated from Department of Justice treatment in other similar cases. The prosecution also appears, to counsel for Mathur, to have deviated from the government's treatment of other similarly situated individuals who have engaged in far worse conduct than that alleged against Mathur. He cites a *New York Times* article to support his understanding that the Obama Administration has subjected companies to civil penalties rather than criminal prosecution. Mathur believes he is being treated more harshly than others. He cites, as an example, a deferred prosecution agreement the Department of Justice entered into with Smith & Nephew executives who agreed to pay $16.8 million dollars to avoid

prosecution. He contends that this example demonstrates that the Anti-Kickback Act can be applied in a highly discretionary manner. He cites other local examples of health care providers who were permitted to settle health care fraud cases with no criminal charges filed.

He also argues that the rule of lenity requires that the Anti-Kickback Act be applied narrowly. He relies on a recent Ninth Circuit decision in *United States v. Nosal*, 676 F.3d 854 (9th Cir. 2012), in which the Ninth Circuit refused to apply the Computer Fraud and Abuse Act to the defendant's conduct. In *Nosal,* the Ninth Circuit stated that statutes should be constructed narrowly to avoid unintentionally turning ordinary citizens into criminals. In this case, Mathur claims that the government seeks to punish him for requesting favorable recommendations from a physician that, unbeknownst to him, was a confidential informant for the government. If the government can prosecute Mathur under the Anti-Kickback Act, "then a health care executive should be prosecuted for merely purchasing an expensive dinner for a doctor in the hopes that the doctor would speak favorably to others about the executive's business." According to Mathur, even purchasing a hamburger for a doctor hoping to get a medical referral would, under the government's interpretation of the Anti-Kickback Act, be a federal felony. For these reasons, the court should dismiss the Indictment on overbreadth and vagueness grounds.

II. Applicable Law and Analysis

A. The Anti-Kickback Act

Mathur asserts various constitutional challenges to the Anti-Kickback Act, 42 U.S.C. § 1320a-7b(b)(2)(A), the statute under which he is being prosecuted. It provides, in relevant part:

> (2) Whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person–
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> (A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program . . .
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> shall be guilty of a felony and upon conviction thereof, shall be fined no more than $25,000 or imprisoned for not more than five years, or both.

Id.

Congress amended the Anti-Kickback Act in 1977 to strengthen the government's ability to prosecute fraud and abuse in the Medicare and Medicaid system. *See* H.R. Rep. No. 95-393, pt. 2, at 44 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3039, 3047. The legislative history notes the disturbing degree of fraudulent and abusive practices associated with providing health services financed by Medicare and Medicaid programs. The 1977 amendments added language prohibiting: (a) the solicitation or receipt of "any remuneration (including kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind," in return for referrals; and (b) the offer or payment of such remuneration to "induce" referrals. *Hanlester*, 51 F.3d at 1396 (citing Pub.L. No. 95-142, 91 Stat. 1175, 1182 (1977)). The 1977 amendments also upgraded a violation of the Anti-Kickback Act from a misdemeanor to a felony. *Id*.

Mathur claims the Anti-Kickback Act is unconstitutional under the First Amendment because it is facially overbroad and as applied to the conduct alleged in this case. He also argues that the statute is void for vagueness because it is incomprehensible to a person of ordinary intelligence. His vagueness challenge is based on the Due Process Clause of the Fifth Amendment.

B. Mathur's Request for an Evidentiary Hearing

Mathur's Motion to Dismiss contains extensive factual arguments about the government's evidence as revealed in discovery produced to Mathur. It also advances Mathur's theory of what the "objective evidence" shows–specifically, that Mathur engaged in innocent non-criminal conduct intended to promote his business. It relates the history of Mathur's personal and professional relationship with the physician, who is the government's primary witness, and their respective families. The Motion details at some length the content of tape recordings the physician made with Mathur that the government also produced in discovery.

As an initial matter, the government is correct that, for purposes of deciding this Motion to Dismiss, the court must accept the facts pled in the Indictment as true. This has been the law in the Ninth Circuit for more than fifty years. *See Winslow v. United States*, 216 F.2d 912, 913 (9th Cir. 1954), *cert. denied* 349 U.S. 922 (1955). Mathur is not entitled to a pre-trial evidentiary hearing to obtain a preview of the government's evidence and an opportunity to cross-examine its witnesses. In deciding a motion to dismiss, the court may not consider whether the government can *prove* its case, only whether accepting the facts as alleged in the Indictment as true, a crime has been alleged.

Applying this standard, the court finds that the Indictment in this case states a violation of the Anti-Kickback Act when read as a whole to include the facts necessarily implied from the Indictment and construed according to common sense. *See United States v. Blinder*, 10 F.3d 1468, 1471 (9th Cir. 1993). The Indictment adequately alleges the elements of the offense and fairly informs Mathur of the charges.

The Indictment alleges that Mathur knowingly and willfully offered and paid remunerations, including a kick-back or bribe, directly or indirectly, overtly or covertly, in cash or in kind to refer individuals, including Medicare patients, to UMS for the furnishing of services for which payment may be made in whole or in part under a federal health care program. The Indictment alleges specific dollar amounts and the dates on which the remunerations were paid in return for Medicaid referrals. It mirrors the statutory elements of the offense in sufficient detail to allow Mathur to prepare his defense. Whether any remuneration Mathur paid to the physician was for the purpose of inducing a referral for a Medicare or Medicaid patient in violation of the Anti-Kickback Act as the government alleges, or merely a legitimate and accepted business practice as Mathur contends, is for the jury to determine. The Indictment alleges that Mathur made nine separate cash payments ranging in amounts from $1,500.00 to over $5,000.00, and totaling $26,000.00, to induce the physician to refer Medicaid patients to him. Whether the government can prove these payments were made is for the jury to decide. The Indictment alleges a crime, and Mathur's factual arguments about the government's evidence and the reasonable inferences to be drawn from that evidence are not for the court to decide in a motion to dismiss. Mathur is not entitled to an evidentiary hearing to explore whether the government can prove its case.

C. Mathur's First Amendment Facial Overbreadth Challenge

Mathur seeks to dismiss the Indictment arguing that, on its face, the Anti-Kickback Act violates the First Amendment because it criminalizes protected commercial speech. It is well-established that a person to whom a statute may be constitutionally applied cannot challenge that statute because it could conceivably be applied unconstitutionally to others in situations not before the court. *New York v. Ferber*, 458 U.S. 747, 767 (1982); *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973), *superceded by statute on other grounds as recognized in Bauers v. Cornett,* 865 F.2d 1517 (8th Cir. 1989); *United*

States v. Raines, 362 U.S. 17, 21 (1960); *Carmichael v. Southern Coal & Coke, Co.,* 301 U.S. 495, 515 (1937). This rule is based on two cardinal principles of constitutional law. *Ferber*, 458 U.S. at 768. First, constitutional rights are personal in nature. *Id.* Second, Article III of the Constitution limits the jurisdiction of the federal courts to actual cases and controversies. *Id*. This means that the court must not: (a) anticipate a question of constitutional law in advance of the necessity of deciding it; or (b) formulate a rule of constitutional law broader than required by the precise facts to which the rule will be applied. *Id*. at n.20.

However, where First Amendment rights are implicated, the Supreme Court has carved out an exception to this rule and allowed constitutional overbreadth challenges even when the challenger's conduct may be legitimately regulated under the statute. The First Amendment overbreadth doctrine is based on the weighty counterveiling policy that constitutionally-protected speech could be chilled by the fear of criminal sanctions. *Id*. For this reason, the Supreme Court has allowed challenges to overly broad statutes even though the conduct of the person challenging the statute "is clearly unprotected and could be proscribed by a law drawn with the requisite specificity." *Id.* (citing *Dombrowski v. Pfister,* 380 U.S. 479, 486 (1965); *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940); *United States v. Raines,* 362 U.S. at 22-23; *Gooding v. Wilson*, 405 U.S. 518, 521 (1972)). However, the Supreme Court has made clear that the First Amendment overbreadth doctrine is "strong medicine" only to be used as a "last resort" where a statute implicates a "substantial" amount of protected expression. *Ferber,* 458 U.S. at 769 (citing *Broadrick,* 413 U.S. at 613, and recognizing the wide-reaching effects of striking down a statute on its face at the request of a party whose conduct may be punished despite the First Amendment). The Supreme Court has held that "particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 770.

In deciding whether a federal statute is overbroad, the court must construe the statute to avoid constitutional problems if the statute is subject to a limiting construction. *Id.* at 769 (citing *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). Additionally, even if a federal statute is impermissively overbroad and not subject to a narrowing construction, the law should not be stricken as invalid on its face if the invalid portion is severable from the remainder of the statute. *Id.* (citing *United States v. Thirty-Seven*

Photographs, 402 U.S. 363 (1971)). Rather, if the overbroad law is severable, only the unconstitutional portion should be declared invalid. *Id*. The Supreme Court has been reluctant to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied. *Parker v. Levy,* 417 U.S. 733, 760 (1974). Thus, even if there are marginal applications in which a statute would infringe on speech protected by the First Amendment, the court should not declare the statute facially invalid if it also covers a range of easily identifiable conduct that may be constitutionally proscribed. *Id.* In fact, the Supreme Court's general practice when confronted with a facial overbreadth challenge to a criminal statute sought to be applied against protected conduct is to reverse a particular conviction, rather than to invalidate the law in its entirety. *Ferber,* 458 U.S. at 773 (citing *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Edwards v. South Carolina*, 372 U.S. 229 (1973)).

Generally, the First Amendment prohibits the government from restricting expression because of its message, ideas, subject matter, or content. *United States v. Alvarez*, 132 S.Ct. 2537, 2543 (2012) (citing *Ashcraft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002)). Content-based restrictions on speech are presumed invalid, and the government bears the burden of showing they are constitutional. *Id*. at 2544. However, the government may restrict some speech without violating the First Amendment. *Id.* at 2547 (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)). From 1791 to the present, the Supreme Court has upheld content-based restrictions on speech based on an ad hoc balancing of relative social costs and benefits in a limited number of situations. *Alvarez*, 132 S.Ct. at 2537. Content-based restrictions on speech have been permitted for a few "historic and traditional categories of expression long familiar to the bar," including: incitement to imminent lawless actions; obscenity; defamation; so-called "fighting words;" true threats; and speech presenting some grave and imminent threat the government has the power to prevent. *Id*. at 2539 (internal punctuation and citation omitted).

The same overbreadth scrutiny has not been applied to conduct-related regulation implicating the First Amendment. *Ferber*, 458 U.S. at 766. Additionally, speech promoting or encouraging illegal activity, such as illegal drug use, may be regulated or banned entirely. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982) (citing *Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* 447 U.S. 557, 563-64 (1980)).

Mathur argues the Anti-Kickback Act infringes protected commercial speech, specifically speech related to solicitation and marketing of his business. It is undisputed that commercial speech enjoys some protection under the First Amendment. *See, e.g., Virginia State Board of Pharmacy*, 425 U.S. at 771. The Supreme Court defines commercial speech as "expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas,* 447 U.S. at 561. Mathur cites *Bolger v. Young's Drug Products Corporation* for the proposition that, in considering whether speech is commercial, the court should make "the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." 463 U.S. 60, 64 (1983). Applying *Bolger*, he argues that if the facts present a close question, speech should be characterized as commercial speech if it is an advertisement, refers to a particular product, and the speaker has an economic motivation for engaging in the speech. Mathur maintains that, where these combination of characteristics exist, *Bolger* provides strong support for the conclusion that the speech in question is commercial speech, and therefore protected by the First Amendment.

Mathur also relies on the Supreme Court's decision in *Edenfield v. Fane*, 507 U.S. 761 (1993). There, the Supreme Court held that a certified public accountant's personal solicitation of potential clients, which communicated no more than truthful, non-deceptive information and proposed lawful commercial transactions, was protected by the First Amendment as commercial expression. Mathur claims that all he did here was develop a friendship and business relationship with the physician, hoping the physician would make favorable recommendations and promote UMS to other health care professionals who could, in turn, refer business to UMS. This, he argues, is protected commercial speech. The government alleges Mathur made cash payments to induce referrals.

Speech and writing "used as an integral part of conduct in violation of the valid criminal statute" is not protected by the First Amendment. *Gibony v. Empire Storage & Ice Co.,* 336 U.S. 490, 498. "[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed." *Id.* at 502 (citing *Fox v. Washington*, 236 U.S. 273, 277 (1915); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)). Proscribing bribery does not infringe on any

First Amendment rights because it neither chills, nor is intended to chill, constitutionally-protected activities. *United States v. Dischner*, 974 F.2d 1502, 1511-12 (1992), *overruled on other grounds by United States v. Morales,* 108 F.3d 1031, 1035 (9th Cir. 1997). Laws which focus on criminal conduct such as perjury, tax or administrative fraud, or impersonating an officer are not protected under the First Amendment even though they can be violated by means of speech. *United States v. Alvarez*, 617 F.3d 1198, 1213 (9th Cir. 2010).

Solicitation is protected expression under the First Amendment. *See, e.g., Comite de Jornaleros*, 657 F.3d 936, 945 (9th Cir. 2011). However, the Anti-Kickback Act does not regulate speech protected by the First Amendment. *See Hanlester,* 51 F.3d at 1398. Rather, it regulates the *conduct* of paying or offering to pay remuneration in return for Medicare or Medicaid referrals. *Id.* (stating "[t]he statute regulates only economic conduct"). The court finds that the Anti-Kickback Act is not facially overbroad. It is not a content-based regulation of speech. The Supreme Court has recognized a law may be held invalid as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 130 S.Ct. 1577, 1587 (2010) (citing *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008)).

The Supreme Court has held that the first step in overbreadth analysis is to construe the challenged statute because "it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Williams*, 553 U.S. 285, 293 (2008). Here, the Anti-Kickback Act prohibits a person from knowingly and willfully offering or paying any remuneration (including any kickback, bribe or rebate) directly or indirectly, overtly or covertly, in cash or in kind to induce a person to refer an individual to a person for the furnishing or arranging of the furnishing for any item or service for which payment may be made in whole or in part under a federal health care program. The 1977 amendments to the Anti-Kickback Act underscore Congress's concern with escalating fraud and abuse in the Medicare and Medicaid systems and attempt to strengthen the government's ability to prosecute such fraud and abuse. *See Hanlester*, 51 F.3d at 1396. "Congress introduced the broad term 'remuneration' in the 1977 amendment of the statute to clarify the types of financial arrangements and conduct to be classified as illegal under Medicare and Medicaid." *Id.* at

1398. The phrase "any remuneration" was intended to broaden the law which had earlier only referred to kickbacks, bribes, and rebates. *Id.* The Ninth Circuit has held that for purposes of the Anti-Kickback Act, the term "induce" means "an intent to exercise influence over the reason or judgment of another in an effort to cause the referral of program-related business." *Id.*

Additionally, in 1987, Congress responded to the concerns of health care providers regarding the Anti-Kickback Act's prohibition of certain types of beneficial business relationships by authorizing the Office of Inspector General of the U.S. Department of Health & Human Services to promulgate regulations designating specific "safe harbors" for various payment and business practices that could potentially implicate Anti-Kickback Act. These safe harbors, codified at 42 C.F.R. § 1001.952, specify that certain relationships and conduct, although technically falling within the purview of the statute, will not be prosecuted as criminal offenses under the Anti-Kickback Act. The court concludes that with these statutory definitions, judicial constructions, and regulatory safe harbors, a substantial number of the Anti-Kickback Act's applications are not unconstitutional on First Amendment grounds, judged in relation to the statute's plainly legitimate goal of combating health care fraud.

D. Mathur's First Amendment as Applied Challenge

Mathur concedes the government has a legitimate interest in deterring and preventing health care fraud, especially in relation to Medicare and Medicaid. However, he claims that the "objective evidence" and reasonable inferences drawn from it establish that he was engaged in a personal and professional business relationship to promote his business, which is not a criminal offense. He claims that the Anti-Kickback Act is being unconstitutionally applied to his First Amendment protected commercial speech.

The court has found that the Anti-Kickback Act is not facially overbroad under the First Amendment. Mathur's hypothetical questions about the scope of the Anti-Kickback Act have not persuaded the court that a substantial number of the Anti-Kickback Act's applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep. The "last resort" of the "strong medicine" of declaring the Anti-Kickback Act facially overbroad and unconstitutional under the First Amendment is not warranted based on the arguments presented in this case. The Anti-Kickback Act regulates conduct, not merely speech. Even if there are marginal applications in which the Anti-

Kickback Act would infringe the First Amendment, the court will not declare the statute facially invalid if it also covers a range of easily identifiable conduct that may be constitutionally proscribed. There is no question that paying or offering to pay bribes or rewards for Medicare referrals may be constitutionally proscribed. Whether that is what Mathur did is for the jury to determine. The court must therefore apply the two cardinal principles of constitutional law and not anticipate a question of constitutional law in advance of the necessity of deciding it, or attempt to formulate a rule of constitutional law broader than required by the precise facts to which the rule will be applied. *See Ferber*, 458 U.S. at 767. The facts will be determined by the jury after evidence is presented at trial.

E. The Rule of Lenity

The rule of lenity is a long-standing principle that courts must construe ambiguous criminal statutes narrowly to avoid "making criminal law in Congress's stead." *United States v. Santos*, 553 U.S. 507, 517 (2008), *superceded by statute on other grounds as stated in United States v. Elder*, 682 F.3d 1065, 1072 n.3 (8th Cir. 2012). Mathur's Reply argues the court should follow the Ninth Circuit's *Nosal* rule of lenity analysis and dismiss the Indictment. In *United States v. Nosal*, 676 F.3d 854 (9th Cir. 2012), the Ninth Circuit applied the rule of lenity, holding that the phrase "exceeds authorized access" in the Computer Fraud and Abuse Act ("CFAA") does not extend to violations of an employer's computer use restrictions. The Ninth Circuit departed from decisions of the Fifth, Seventh, and Eleventh Circuits that interpreted the CFAA broadly to cover violations of corporate computer use restrictions or violations of a duty of loyalty. The Ninth Circuit found that these decisions looked only to the culpable behavior of the defendants before them and failed to consider the effect on millions of ordinary citizens caused by the statute's definition of the phrase "exceeds authorized access." The Ninth Circuit found that the Fifth, Seventh, and Eleventh Circuits failed to apply the rule of lenity to construe an ambiguous criminal statute narrowly.

The CFAA defines the phrase "exceeds authorized access" as "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled to obtain or alter." 18 U.S.C. § 1030(e)(6). The Ninth Circuit acknowledged that the phrase "exceeds authorized use" could reasonably be interpreted to prohibit unauthorized use from outside hackers, *i.e,* individuals with no authorized access at all, as well as inside hackers, *i.e.*,

individuals who have authorized access to a computer, but who access unauthorized information and files. Nosal was an employee who left his company and convinced some of his former colleagues still employed for the company to help him start a competing business. The employees used their log-in credentials to download source lists, names, and contact information from a confidential database on the company's computer and transferred that information to Nosal. The employees were authorized to access the database, but the company had a policy forbidding them to disclose confidential information. The government charged Nosal with CFAA violations. The trial court granted Nosal's motion to dismiss, and the Ninth Circuit affirmed.

The Ninth Circuit reasoned that the government's interpretation, which would apply the statute to individuals who had authorized access but used the computer for unauthorized purposes (to download and transfer confidential source lists and names and contact information), would expand the scope of the CFAA "far beyond computer hacking to criminalize any unauthorized use of information obtained from a computer." *Id*. at 859. Because this "would make criminals of large groups of people who would have little reason to suspect they are committing a federal crime" the Ninth Circuit "was properly skeptical" about whether Congress intended "to criminalize conduct beyond that which is inherently wrongful, such as breaking into a computer." *Id.* Relying on *United States v. Kozminski*, the Ninth Circuit found that adopting the government's broad interpretation of the CFAA to apply to authorized users who exceed the scope of their authorization would delegate to prosecutors and juries the inherently legislative task of determining what types of activity are so morally reprehensible that they should be punished as crimes. *Id.* at 862 (internal quotations and citations omitted). Giving that much power to a prosecutor invites discriminatory and arbitrary enforcement. *Id*.

The Anti-Kickback Act does not suffer from the same infirmities the Ninth Circuit found objectionable in *Nosal*. For purposes of this Report of Findings and Recommendation, the court need not decide the outer markers of the conduct which may be constitutionally proscribed by the Anti-Kickback Act. In this case, the government alleges that Mathur paid over $26,000.00 in cash in nine different transactions, ranging in amounts between $1,500.00 and a little over $5,000.00, to induce the physician to make Medicare referrals to Mathur's business. The Indictment does not involve a health care executive purchasing a hamburger or an expensive dinner for a doctor in the hopes that the doctor

would speak favorably to others about the executive's business. The Anti-Kickback Act is not ambiguous about whether bribes, kickbacks, or rebates may be offered or paid to induce referrals of Medicare business. The court concludes that the rule of lenity does not bar this prosecution.

F. Mathur's Void for Vagueness Challenge

The Due Process Clause of the Fifth Amendment requires that a criminal law provide the kind of notice that will enable ordinary people to understand what the law prohibits. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (citing *Kolender v. Lawson,* 461 U.S. 352, 357 (1983)). The Due Process Clause of the Fifth Amendment is violated if "a statute is so vague about what is prohibited that it authorizes or encourages arbitrary and discriminatory enforcement. *Id*. Or, as the Supreme Court stated in *United States v. Williams*, "A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." 553 U.S. 285, 304 (2008).

Mathur claims that the Anti-Kickback Act is so broad that it is incomprehensible to a person of ordinary intelligence and too vague to provide him with constitutionally fair notice that his alleged conduct is a criminal act. He also argues the statute is so broad that it permits selective or discriminatory enforcement. Mathur appears to argue that the statute is both unconstitutionally vague on its face and as applied to the facts alleged in the Indictment. Mathur does not contend bribery or kickbacks may not be constitutionally proscribed. Rather, he argues that this is not what he did. As the court has now stated several times, that is what the jury must decide.

It is a well-established principle of constitutional law that a person who has engaged in some conduct which is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 445 U.S. 489, 495 (1982). In *Holder v. Humanitarian Law Project*, the Supreme Court recently reaffirmed that the "rule makes no exception for conduct in the form of speech." 130 S.Ct. 2705, 2719 (2010). Mathur is barred from brining a facial challenge on Fifth Amendment grounds because the Indictment alleges conduct that is clearly proscribed. His facial challenge fails because of the general rule that a defendant who engages in conduct that is clearly forbidden by statute cannot complain of the vagueness of a statute as it applies

to others' conduct. Application of this rule precludes Mathur from litigating the constitutional rights of others. This rule not only protects against "unnecessary pronouncement on constitutional issues," but also against "premature interpretation of statutes in areas where their constitutional application may be cloudy." *Raines,* 362 U.S. at 21. Additionally, it ensures that federal courts make informed judgments by limiting their decisions to actual, not hypothetical, cases. *See Ferber,* 458 U.S. at 768; *see also Raines,* 362 U.S. at 22.

Finally, the Ninth Circuit has held that the Anti-Kickback Act "gives fair warning of what is prohibited and is not unconstitutionally vague." *Hanlester*, 51 F.3d at 1398. The First and Eleventh Circuits have also held that the Anti-Kickback Act is not unconstitutionally vague. *See United States v. Baystate Ambulance and Hospital Rental Service, Inc.*, 874 F.2d 20, 33 (1st Cir. 1989); *United States v. Starks*, 157 F.3d 833, 840 (11th Cir. 1998). At least two other published district court decisions have reached the same conclusion. *See United States v. Neufeld*, 908 F.Supp. 491 (S.D. Ohio 1995); *United States v. Vaghela*, 970 F.Supp. 1018, 1022 (M.D. Fla. 1997). Mathur has not cited, and the court is not aware of any decision which has held that the Anti-Kickback Act is unconstitutionally vague.

G. The 2010 PPACA Amendments

Mathur contends PPACA's addition of subsection (h) to the Anti-Kickback Act "has vitiated the specific intent requirement . . . [and] even an inadvertent 'inducement' can now form the basis of a criminal prosecution." This argument was also raised in a separate Motion to Dismiss (Dkt. #51). In the court's Report of Finding and Recommendation (Dkt. #112) denying that Motion, the court summarized the split of authority among federal appellate courts about the Anti-Kickback Act's use of the phrase "knowingly and willfully." It observed that in *Hanlester,* the Ninth Circuit construed the phrase "knowingly and willfully" to require the United States to prove that a defendant: (1) knew that the Anti-Kickback Act prohibited offering or paying remuneration to induce referrals; and (2) engaged in prohibited conduct with the specific intent to disobey the law. The Ninth Circuit was the only court to conclude that the phrase "knowingly and willfully" in the Anti-Kickback Act required proof that a defendant violated a known legal duty. The majority view was first articulated by the First Circuit in *United States v. Baystate Ambulance & Hospital Rental Service, Inc*., 874 F.2d 20 (1st Cir. 1989). There, the First Circuit upheld a jury instruction that the term "knowingly" simply means to do

something voluntarily or deliberately and not by mistake or accident. The First Circuit also approved a jury instruction which defined the term "willfully" for purposes of the Anti-Kickback Act to mean to do something purposely with the intent to violate the law, or to do something purposely that the law forbids. Other circuit courts of appeal and district courts adopted different formulations, but all had concluded that the United States is not required to prove that the defendant knew of and intended to violate the Anti-Kickback Act to be convicted of an offense. Mathur seems to suggest here that the PPACA's addition of subsection (h) renders the Anti-Kickback Act unconstitutionally vague because after the 2010 amendments, the statute is "incomprehensible."

The court finds that the PPACA's addition of subsection (h) did not eliminate the specific intent requirement from the Anti-Kickback Act. The government must still prove a knowing and willful violation. Rather, the addition of subsection (h) resolved the split of authority among federal appellate courts and clarified what "willfully" means for purposes of the Anti-Kickback Act. The legislative history of the PPACA supports this finding and underscores Congress' intent in adding subsection (h). The Congressional Record provides,

> The bill also addresses confusion in the case law over the appropriate meaning of 'willful' conduct in health care fraud. Both the anti-kickback statute and the health care fraud statute include the word 'willfully.' In both contexts, *the Ninth Circuit Court of Appeals has read the term to require proof that the defendant not only intended to engage in unlawful conduct, but* also *knew of the particular law in question and intended to violate that particular law.* This heightened mental state requirement may be appropriate for criminal violations of hyper-technical regulations, but it is inappropriate for these crimes, which punish simple fraud. . . . *[The bill] clarifies that 'willful conduct' in this context does not require proof that the defendant had actual knowledge of the law in question or specific intent to violate that law.* As a result, health care fraudsters will not receive special protection they don't deserve.

155 Cong. Rec. S10853 (daily ed. Oct. 28, 2009) (statement of Rep. Kaufman discussing predecessor bill to PPACA, the Health Care Enforcement Act of 2009) (emphasis added).

Additionally, in discussing the Senate manager's amendment to H.R. 3590 (later enacted as PPACA), the Congressional Record provides,

> The manager's amendment also incorporates a vital anti fraud amendment . . .derived from the Health Care Fraud Enforcement Act. . . .The provision provides for a number of statutory changes to strengthen fraud enforcement.

/ / /

> . . . It also clarifies the intent requirement of another key health care fraud statute in order to facilitate effective, fair, and vigorous enforcement.

155 Cong. Rec. S13692-93 (daily ed. Dec. 21, 2009) (statement of Rep. Leahy).

Thus, the PPACA has not removed a specific intent requirement from the Anti-Kickback Act as Mathur claims. In order to prove a violation of the Anti-Kickback Act, the government must still show that a criminal defendant acted "knowingly and willingly" in offering or paying remunerations in exchange for patient referrals. The PPACA simply clarified that the government is not required to show a criminal defendant specifically knew the Anti-Kickback Act prohibited offering or paying consideration to induce referrals and intended to violate the law.

Counsel have not briefed whether subsection (h)'s amended *scienter* requirement may be applied retroactively. Mathur's Reply (Dkt. #69) to his other Motion to Dismiss (Dkt. #51) argued, for the first time, that the 2010 amended *scienter* requirement does not apply retroactively to conduct which occurred before the effective date of the PPACA, *i.e.*, to the conduct charged in Counts 1-6 of the Indictment. He claims that applying the amended definition of knowingly and willfully to Counts 1-6 would violate the *Ex Post Facto* Clause of the Constitution. The court will not consider arguments raised for the first time in a reply brief with no opportunity for government counsel to respond. The court's order regarding trial required the parties to submit proposed jury instructions and trial memoranda the week before trial. Both sides should, therefore, submit proposed jury instructions and provide the trial court with legal authority supporting their respective positions regarding the *scienter* requirement that applies to all of the counts charged in the Indictment.

III. Conclusion

For all the foregoing reasons,

IT IS RECOMMENDED that Mathur's Motion to Dismiss Based Upon Overbreadth and Vagueness and Other Constitutional Principles (Dkt. #48) be DENIED.

Dated this 13th day of September, 2012.

Peggy A. Leen
United States Magistrate Judge